and proper to be done for the safety of the workman in the circumstances of the particular case. (See Lord MacDermott in *Winter* v. *Cardiff R.D.C.*[1]). In our judgment, in the circumstances of the present case, we can see no ground for disagreeing with the trial judge's decision that the first defendants had failed in their duty towards the plaintiff.

We turn now to deal with the appeal of the second defendants. As we have said the mobile crane No. SGC. 3797 was owned by the third defendant. The crane was operated by a driver and an attendant who acted as signalman to the driver. On August 19, 1972 the crane, with its driver and attendant, was one of two mobile cranes hired by the first defendants, who had contracted to load goods on to a tongkang at Robinson Quay, from the second defendants, who owned mobile cranes for the purpose of letting them out on hire. The first defendants had on previous occasions hired mobile cranes from the second defendants.

The evidence of the plaintiff, which was not disputed at the trial, was that he was picking up a carton from a pallet resting in the hold of the tongkang when he was struck by another fully loaded pallet which was being lowered on to the tongkang. The evidence of the crane driver, whom the trial judge found to be an entirely satisfactory witness, was that he lowered the pallet which struck the plaintiff when the crane attendant gave him the signal to lower it. The attendant was not called to give evidence at the trial. On the evidence the trial judge found that the accident to the plaintiff was caused through the negligence of the crane driver and/or the signalman and not contributed to by the plaintiff in any way.

It is contended on behalf of the second defendants that there was no evidence to support the trial judge's finding that the crane driver was negligent and that the trial judge, having found the crane driver to be an entirely satisfactory witness, ought to have found on the crane driver's evidence that the crane driver was not guilty of any negligence in lowering the loaded pallet in response to the signal of the crane attendant. We accept this contention.

It is also contended on behalf of the second defendants that the trial judge erred in finding that the crane attendant was negligent as there was no evidence to support that finding. In our judgment, it must follow, on the trial judge's acceptance of the crane driver's evidence that he lowered the loaded pallet on a signal from his attendant, that the crane attendant was negligent in giving the signal to lower when the plaintiff was engaged in removing several cartons of milk on a pallet resting in the hold of the tongkang.

It is next contended that even though the crane driver and/or the attendant were negligent the second defendants were not vicariously liable for their negligence because the trial judge should have found on the evidence that they were servants of the third defendant, who owned the crane, and not servants of the second defendants. As we have come to the conclusion that the crane driver was not negligent the question of vicarious liability in respect of the crane driver does not arise in the present case. With regard to the crane attendant there is a clear admission by Toh Guan Leng, the then manager and partner of the second defendant firm, that the crane attendant was in the employ of the second defendants at the date of the accident. It is urged on behalf of the second defendants that the trial judge should have found on the evidence that Toh Guan Leng was the agent of the third defendant and in his capacity as such agent had employed the crane attendant so as to constitute the third defendant the master of the crane attendant at all material times. It is to be observed that Toh Guan Leng was a witness called on behalf of the second defendants and in answer to a question by the court and also during re-examination he unequivocably said that the crane attendant at the date of the accident was an employee of the second defendants.

In our judgment the trial judge was entitled to rely on the admission of Toh Guan Leng that the crane attendant was at the material date the employee of the second defendants and not of the third defendant. In any event, we are of the opinion that on all the evidence before the trial judge the crane attendant was bound to carry out his duties at the material date, in the words of Lord Esher M.R. in *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, Limited*,[2] "according to the orders and under the absolute control of" the second defendants. It follows, in our opinion, that the second defendants must be vicariously liable for the negligence of the crane attendant which resulted in the injuries sustained by the plaintiff.

Accordingly, both appeals must be dismissed with costs.

Appeals dismissed.

Solicitors: *Allen & Gledhill; Murphy & Dunbar; David Marshall; T.L. Lee & Co.*

ASIA COMMODITY TRADERS PTE. LTD. v. FOOK HAI DEVELOPMENT PTE. LTD.

[O.C.J. (Chua J.) February 16, 1978]

[Singapore — Originating Summons No. 24 of 1977]

Contract — Rescission — Sale of office — Partitioning of office at purchasers' request — Misstatement of actual area — Whether purchaser allowed to rescind the contract.

Pursuant to an agreement of October 7, 1974 the plaintiffs agreed to buy from the defendants an office for the price of $350,020 on the basis of $220 per sq. ft. The First Schedule annexed to the said agreement stated that the area of the office was 1,591 sq. ft. Clause 27 of the agreement referred to the area as "an estimate". The office purchased by the defendants was then known as Unit 505. In May, 1975, the plaintiffs requested a brick partition wall to be erected in the office. Thereafter the office became two units known as units 505/505A. By a letter dated November 11, 1976, the defendants informed the plaintiffs that the total area purchased by the latter was 1888 sq. ft. The price of the extra 297 sq. ft. at the rate of $220 per sq. ft. would be $65,340. Subsequently, several correspondence ensued between the parties in which the plaintiffs made it clear that they wished "to resile from the contract". The plaintiffs had paid the defendants $315.018 leaving 10% of the purchase price still unpaid.

The issue before the court was whether the plaintiffs were entitled to rescind the agreement when they were told that

the area of the premises was 1888 sq. ft. and not 1591 sq. ft. The defendants argued, *inter alia*, that they had, at the request of the plaintiffs, subdivided the premises into two units by constructing a brick wall and in consequence the plaintiffs were not entitled to a remedy and that recission was not the appropriate remedy.

Held: (1) there had been a misdescription of the premises due to carelessness on the part of the defendants. The plaintiffs had been greatly prejudiced by the said misdescription and had every right to rescission;

(2) there could be no question of waiver in this case as the partitioning of the premises was carried out more than one year before the plaintiffs were informed of the increased area.

Case referred to:-

(1) *Flight* v. *Booth* 131 E.R. 1160.

ORIGINATING SUMMONS.

H.E. Cashin for the plaintiffs.

David de Souza for the defendants.

Chua J.: By an agreement in writing dated the 7th October, 1974, (the said Agreement), made between Asia Commodity Traders Pte. Ltd. (the plaintiffs) and Fook Hai Development Pte. Ltd. (the defendants), the plaintiffs agreed to buy and the defendants agreed to sell the office described in the First Schedule annexed to the said Agreement being part of the premises on the fifth floor of the building known as "Fook Hai Building" in South Bridge Road, for the price of $350,020, subject, *inter alia*, to Clause 27 of the said Agreement and to the "The (revised) Singapore Conditions of Sale" (the said General Conditions) so far as they were not varied or inconsistent with the terms and conditions of the said Agreement.

The plaintiffs now apply by way of Originating Summons for (1) a declaration that they are entitled to rescind the said Agreement and (2) an order that the sum of $315,018 paid by them to the defendants to be repaid by the defendants to them with interest.

The First Schedule annexed to the said Agreement was as follows:—

"All that office having an area of approximately 1,591 square feet and for the purpose of identification delineated and edged red and marked No. 5.05 on the plan annexed hereto which office is on the Fifth Floor of the building known as "Fook Hai Building" erected on part of the land situate in the Singapore Town in the Island of Singapore and marked on the Government Resurvey Map as Lot 389 of Town Subdivision VI."

The price of $350,020 was arrived at by taking a price of $220 per square foot on the aforesaid area of 1591 square feet.

Clause 27 of the said Agreement was as follows:

"The area shown in the First Schedule hereto is only an estimate. The area shall be measured at floor level and shall include half thickness of common party wall and full thickness of walls along corridor public spaces and full thickness of all external walls and area occupied by structural supports with the said premises shall be included. Provided on the date of completion herein (i.e. upon the issue of the Subsidiary Strata Certificate of Title) that in the event of any difference in the actual area of the said Premises on resurvey and the area stated in the First Schedule hereto there will be an adjustment in the capital payment and/or service charges herein. In the event of any dispute as to the new area of the said Premises the Purchaser shall with the consent of the Vendor and at his own cost and expense procure a Licensed Surveyor approved by the Vendor and the report by the said Licensed Surveyor on the exact area of the said Premises shall be final and conclusive."

The said General Conditions provided, *inter alia*, as follows:—

"The Property is believed and shall be taken to be correctly described as to quantity and otherwise and is sold subject to all chief, quit, and other rents and outgoings and to all incidents of tenure, rights of way and other rights and easements (if any) affecting the same and if any error, misstatement, or omission (not of a serious or vital nature nor considerably affecting the value of the property) shall be discovered in the Particulars Special Conditions or Contract the same shall not annul the sale nor shall any compensation be allowed by or to either party in respect thereof."

The plaintiffs have paid to the defendants in pursuance of the provisions of the said Agreement as to payment of instalments of the price a total sum of $315,018. The last instalment payment made by the plaintiffs was on July 19, 1976. The amount still left to be paid is the 10 per cent of the purchase price, that is $35,002.

The office purchased by the defendants was then known as Unit 505. In May, 1975, the plaintiffs requested that a brick partition wall be erected in the office. Thereafter the office became two units known as units 505/505A.

By letter dated November 11, 1976, to the plaintiffs, the defendants said:

"Please be informed that the Comptroller of Property Tax has revised the abovementioned units No. 505/505A which were purchased by you to units 504 (1285 sq. ft.) and 504A (603 sq. ft.) respectively. Kindly take note."

The total area purchased by the plaintiffs according to this letter was 1888 sq. ft. which is 297 square feet more than the estimated contractual area of 1,591 square feet, an increase of approximately 17.82 per cent. The price of the extra 297 square feet at the rate of $220 per square feet would be $65,340.

On November 16, 1976, the plaintiffs' solicitors wrote to the defendants' solicitors in these terms:—

"Our clients, Asia Commodity Traders Pte. Ltd., who are the intended purchasers of the above referred to unit have received a letter directly from Fook Hai Development Pte. Ltd. dated 11th November 1976, a copy of which was sent to you. By this letter our clients had been informed that the area of their premises will now be 1,888 instead of 1,591 or an additional 297 sq. ft.

It is true that under Clause 27 of the Agreement for Sale it is stated that the area shown in the 1st Schedule is only an estimate and reference is made to a resurvey and that there will be an adjustment in the capital payment and/or the service charges but we have advised our clients that where there is a difference of approximately 20%, we do not think that Clause 27 can be relied upon to cover such a large difference.

We have advised our clients that the difference in area of 20% is not a mere misdescription covered by the provisions of Clause 27 but that it is an error of such magnitude as to entitle our clients to resile from the contract. If you agree please let us have your cheque for $315,010. If you do not agree, we propose taking out a vendor/purchaser summons."

There was no answer from the defendants' solicitors. A reminder was sent by the plaintiffs' solicitors on January 5, 1977, and a reply was asked for by January 7, 1977, failing which the defendants' solicitors were told that the plaintiffs' solicitors had been instructed to take out a vendor, purchaser summons. On January 25, 1977, the plaintiffs commenced the present proceedings.

On February 5, 1977, the defendants wrote to the plaintiffs reminding them that the premises purchased

by them were ready for immediate occupation and requesting the plaintiffs to collect the keys and take possession of the premises and warning the plaintiffs that if they failed to move in by the end of February, 1977, they would have to pay 50 percent of the current monthly maintenance charges for three months from March to May, 1977, and if they failed to move in by the end of June, 1977, they would have to pay in full the monthly maintenance charges. The maintenance charges were based on the area of the premises. The plaintiffs did not take possession of the premises. The parties then tried to reach an amicable settlement but without success.

On April 6, 1977, the defendants wrote to the plaintiffs informing them of the new area of the premises. The defendants said (*inter alia*):—

"The estimated area of 1,591 sq. ft. of the two units as stated in the sale and purchase agreement has now been surveyed and re-measured by our registered surveyor, Mr. Lee Eng Kwang. His measurements show that the total area of Unit 504 is 1,184 sq. ft. and Unit 504A is 603 sq. ft. The total area of the two units is therefore 1,787 sq. ft. or an excess of 196 sq. ft. over the estimated area of 1,591 sq. ft. stated in the Sale and Purchase Agreement."

The letter concluded by setting out the terms under which the defendants were prepared to settle the dispute.

On April 7, 1977, the plaintiffs rejected the defendants' offer. 196 square feet is 12.32 percent more than it was before and the price would be $43,120 more.

The issue in this case is whether the plaintiffs are entitled to rescind the said Agreement when they were told that the area of the premises was 1888 square feet and not 1591 square feet.

The argument of counsel for the defendants was this. Clause 27 of the said Agreement provided that the area of the premises as shown in the First Schedule was only an estimate and the parties were to take the area of the premises on the date of completion that is the area as appears in the Subsidiary Strata Certificate of Title (the Certificate of Title) and that until the Certificate of Title was issued the area envisaged under Clause 27 was unknown. In this case the Certificate of Title had not yet been issued and the defendants had not yet called upon the plaintiffs to complete the sale and purchase of the premises. There was no obligation on the part of the plaintiffs to take possession of the premises when asked to do so by the defendants but they might do so if they wanted to and if they did they would have to pay maintenance fees. It was submitted that there was no need for the plaintiffs to institute the present proceedings and that the plaintiffs should have waited for the date of completion to determine the area of the premises which would be shown in the Certificate of Title.

The plaintiffs were requested by the defendants to take possession of the premises on February 5, 1977, and the plaintiffs were warned that if they did not take possession by the end of February, 1977, they would have to pay 50 per cent of the current monthly maintenance charges and if they failed to take possession by the end of June, 1977, they would have to pay in full the monthly maintenance charges. It is clear from the authorities that if the plaintiffs had gone into possession they would have lost all their remedies. In my view it is not premature for the plaintiffs to commence these proceedings. They had to take a stand when they received the letter of November 11, 1976.

Counsel for the defendants said that the defendants had at the request of the plaintiffs sub-divided the premises into two units by constructing a brick wall and in consequence the plaintiffs were not entitled to a remedy and that rescission was not the appropriate remedy. It is to be noted that the partitioning of the premises was carried out more than one year before the plaintiffs were informed of the increased area. There can be no question of waiver.

Next, counsel for the defendants submitted that there had been no misdescription of the premises and that the plaintiffs knew exactly what they were purchasing.

The evidence was that before the said Agreement was executed by the parties, the plaintiffs signed a Booking Form booking unit 505, the approximate floor area of which was stated as 1591 square feet. According to the defendants this figure of 1591 square feet was obtained from the Tenancy Drawing prepared by their architects of the fifth floor of the building. The Tenancy Drawing showed the floor areas of all the units on the fifth floor. The Tenancy Drawing was dated June 26, 1972, and was revised no less than six times. The last revision was on April 4, 1973. On June 22, 1976, the defendants received from their architects a set of reduced plans showing the revised tenants' lot numbers as approved by the Property Tax Division and the architects requested the defendants to inform their solicitors and the tenants of their respective new lot numbers. The defendants did not inform the plaintiffs until five months later on November 11, 1976. The defendants said that they were under the impression that their solicitors had informed the plaintiffs. On September 10, 1976, the defendants received from their surveyors 'A new list of the areas calculated to the nearest 1 sq. ft." According to the defendants a mistake was made when the plaintiffs were informed on November 11, 1976, that the area of unit 504 was 1285 square feet and unit 504A was 603 square feet. The correct areas should have been 1184 square feet for unit 504 and 603 square feet for unit 504A as disclosed in the surveyor's "new list". The confusion according to the defendants arose due to the renumbering of the units. The defendants said that they did not discover their mistake until sometime in April, 1977, and they wrote the letter of April 6, 1977, to the plaintiffs.

A discrepancy of 18 percent in the area of the premises and an increase of $65,000 in the price of the premises are substantial differences. Even a discrepancy of 12.32 percent in the area of the premises and an increase of $43,120 in the price of the premises are substantial differences. The property which the defendants now wanted to convey differ materially from the property which had been agreed to be sold by the defendants to the plaintiffs. The defendants ought to have known that the area of unit 505 at the time the said Agreement was executed was more than 1591 square feet as the Tenancy Drawing had

been revised a number of times, the last being April 4, 1973, over a year before the said Agreement was executed. It is clear in this case that there had been a misdescription of the premises. On the evidence I find that the misdescription was not wilful or designed but due to carelessness on the part of the defendants. The question was whether the misdescription was such as to entitle the plaintiffs to rescind the contract altogether.

In *Flight* v. *Booth,*[1] Tindal C.J. said (at p. 1162): —

"It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; *Duke of Norfolk* v. *Worthy* (1 Campb. 340), *Wright* v. *Wilson* (1 Mood. & Rob. 207); whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale; *Jones* v. *Edney* (3 Campb. 284), *Waring* v. *Hoggart* (1 Ry. & Mood. 39), and *Stewart* v. *Alliston* (1 Mer. 26). In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones* v. *Edney*, where the subject-matter of the sale was described to be 'a free public house,' while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal."

The plaintiffs' evidence was that they wanted to purchase an office to the amount of $320,000 to $350,000 and that in 1974 they had liquid cash to purchase up to $350,000 and that was the limit they were prepared to spend. The plaintiffs said that if at the time when discussion took place to purchase the property they were told that the price would be $415,000 they would not have entered into the said Agreement and that they were not prepared to raise the extra $65,000 by mortgage. They said that the extra sum they were asked to pay considerably affects the value of the property and they were shocked when they received the letter of November 11, 1976. I came to the conclusion that the plaintiffs had been greatly prejudiced by the misdescription of the premises.

I came to the view that the plaintiffs had every right to rescission and I therefore gave judgment for the plaintiffs for rescission and the return of the $315,018, together with interest at the rate of 8 percent from January 7, 1977, to date of judgment, and costs.

Application allowed.

Solicitors: *Murphy & Dunbar; Tang & Tan.*

MALAYSIAN REPORTS

DAIMAN DEVELOPMENT SDN. BHD. v. MATHEW LUI CHIN TECK AND ANOTHER APPEAL

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Ibrahim J.) July 16 and 31, 1978]

[Johore Bahru — Federal Court Civil Appeal Nos. 169 and 170 of 1977]

Contract — Sale of land and house — Booking pro forma — Developers subsequently sought to increase price — Whether there was contract of sale — Housing Developers (Control and Licensing) Rules, 1970.

Land Law — Sale of land and house by developers — Booking pro forma — Whether formal contract — Whether developers could subsequently increase price — Housing Developers (Control and Licensing) Rules, 1970.

Housing Developers — Booking pro forma — Whether developers could subsequently increase price.

In this case the respondent was desirous of buying a house. He went to see the developers (the appellants), chose a house, paid a booking fee of $700 and signed a booking *pro forma*. According to the booking *pro forma* the parties agreed the purchase price of the house at $26,000. The respondent also agreed that on receiving notice by the respondents he would sign the agreement for sale. Subsequently the appellants informed the respondent that the price of the house was increased to $35,100 because of "amendments to the building plans and increase of material and construction costs." The respondent did not agree to the increased price. The appellants informed the respondent that unless he agreed to pay the deposit based on the increased price, they would cancel the booking and refund the booking fee. The respondent thereupon applied to the court and the High Court gave judgment in his favour and ordered the developers on payment of the balance of the purchase price to transfer the property to the respondent. The appellants appealed.

Held, dismissing the appeal: (1) the booking *pro forma* was a firm contract. It identified the parties and it specified the property to be bought and its price;

(2) the appellants as developers were bound by the Housing Developers (Control and Licensing) Rules 1970 and only details could be inserted into the further agreement. In this case the details were never put to the respondent and he never had an opportunity to consider them;

(3) in the circumstances the appellants had no right to change the price stated in the booking *pro forma.*

Case referred to:-

(1) *Yeo Long Seng* v. *Lucky Park (Pte) Ltd.* [1971] 1 M.L.J. 20.

The following cases were also cited in the argument: *Yap Eng Thong & Anor.* v. *Faber Union Ltd.* [1973] 1 M.L.J. 191; *Skyline Trading Co.* v. *Tiow Yoke Lan* [1969] 2 M.L.J. 212; *Low Kar Yit & Ors.* v. *Mohammed Isa & Ors.* [1963] M.L.J. 165.

The following judgment of the court below (J.B. Civil Suit No. 416 of 1975, *Arthur Lee* for the plaintiff and *S. Patmanathan* for the defendants) was delivered on August 15, 1977:

Syed Othman J.: The plaintiff seeks specific performance by the defendants of an agreement between them for the sale by the defendants of a piece of a property i.e. land together with a single storey semi-detached house to be erected thereon at Taman Sri Tebrau, Johore Bahru, for $26,000; alternatively damages for breach of contract.

Both parties are agreed that the whole case depends on the construction of certain provisions in the